APPENDIX

Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1346

JOHN L. McLUCAS, Secretary of the Air Force, ET AL.,
Appellants

—v.—

RAYMOND G. DeCHAMPLAIN

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

DOCKETED MARCH 4, 1974
CONSIDERATION OF JURISDICTION POSTPONED JUNE 24, 1974

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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1863-73

DOCKET ENTRIES

Date	Filings—Proceedings
1973	
Oct. 3	Complaint, appearance, Exhibits A thru F.
Oct. 3	Summons, Copies (8) and Copies (8) of Complaint issued.
Oct. 3	Motion for preliminary injunction; Affidavit; Exhibits A thru D; Affidavit; Points and Authorities.
Oct. 16	Stipulation extending time within which deft. may respond to pltfs' motion for preliminary injunction to 10-25-73.
Oct. 25	Motion of defts. to dismiss the complaint; Points and Authorities in support and in opposition to pltf's motion for preliminary injunction; exhibits A thru D; c/m 10-25 appearance of Michael A. Katz, Ass't. U.S. Attorney.
Nov. 1	Reply memorandum by pltf; exhibits A thru D; c/m 10-31-73.
Nov. 8	Supplemental memorandum of points and authorities by defts. in support of motion to dismiss and in opposition to pltf's motion for preliminary injunction; exhibits E & F; c/m 11-7-73.
Nov. 8	Supplemental reply memorandum by pltf. in support of motion for a preliminary injunction and in opposition to deft's motion for dismissal; c/m 11-7.

Date	Filings—Proceedings
1973	
Nov. 8	Copy of notice by pltf. of amendment to motion for preliminary injunction; affidavit; attachment; c/m 11-8.
Nov. 9	Plaintiff's motion for preliminary injunction taken under advisement. Defts' motion to dismiss, taken under advisement.
Nov. 13	Second supplemental memorandum of points and authorities by defts. in support of motion to dismiss and in opposition to pltf's motion for preliminary injunction; c/m 11-13-73.
Nov. 13	Memorandum; Findings of Fact and Conclusions of Law. Preliminary Injunction granted & enjoining defts. The Court will not require pltf. to post security.
Nov. 15	Notice of appeal by defts. from Order of Nov. 13, 1973; copies to Joseph Forer, David Rein & Leonard B. Boudin. (U.S. No Fee).
Dec. 12	Notice of appeal by defts to the Supreme Court of the United States from the order of November 13, 1973; c/m 12-12-73.
Dec. 26	Motion of defts to extend time for docketing record on appeal; c/m 12-26-73.
1974	
Jan. 3	Order extending time within which defts. may docket the record on appeal in the USCA until 2-13-74.
Mar. 19	Preliminary record on appeal delivered to USCA. Receipt acknowledged.
Apr. 11	Motion of pltff. for release from confinement pending appeal; Memorandum; Exhibit A, B, C & D; c/m 4-10-74.

Date	Filings—Proceedings
1974	
Apr. 23	Memorandum of Points and Authorities of defts. in opposition to pltff's motion for release from confinement pending appeal; Gov't Exhibits A, B & C; c/m 4-23-74.
Apr. 30	Memorandum of Points and Authorities of pltff. in support of motion for release from confinement; Exhibit A & B; c/m 4-26-74.
May 6	Pltffs Motion for release pending appeal denied.
May 6	Order denying motion of pltff. for release from confinement pending appeal.
June 28	Certified copy of order from the Supreme Court of the United States, that further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 74-1363

Date	Filings—Proceedings
1974	
Mar. 19	Certified Original Preliminary Record (no transcript).
Mar. 19	4-Appellants' motion to extend time to docket appeal until the Supreme Court has disposed of case, John L. McLucas, et al. v. Raymond G. DeChamplain, October term of 1973 in #73-1346.
Mar. 20	4-Appellee's opposition to motion to extend time to docket appeal until Supreme Court has disposed of case, John L. McLucas, et al. v. Raymond G. DeChamplain, October term of 1973 in #73-1346.
Mar. 25	4-Appellants' reply to opposition to motion for extending time to docket appeal.
Mar. 28	4-Appellee's motion for leave to file supplemental reply memorandum in opposition to Government's motion for extension of docketing time, and supplemental memorandum.
Apr. 1	4-Appellants' response to motion for leave to file supplemental reply memorandum.
Apr. 5	Per Curiam order that the Clerk is directed to file appellee's supplemental reply memorandum; appellants' motion is granted and the time for docketing the record in this appeal is extended for a period of 15 days from the date of the final decision of the Supreme Court in the matter of McLucas, et al. v. DeChamplain, No. 73-1356; the motion to dismiss is denied; the appellee's motion for release pending appeal is denied without prejudice to its being submitted to the District Court.

Date	Filings—Proceedings
1974	
Apr. 5	4-Appellee's supplemental memorandum in opposition to Government motion to extend docketing time.
May 17	Per Curiam order sua sponte, that the order filed April 5, 1974 is amended by striking the numbers 73-1356 in paragraph three thereof and inserting the numbers 73-1346.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1863-73

[Filed October 3, 1973]

RAYMOND G. DECHAMPLAIN
United States Air Force
1840th Air Base Wing
Richards-Gebaur AFB, Missouri
PLAINTIFF

—against—

JOHN L. MCLUCAS,
Secretary of the Air Force
Pentagon
Washington, D. C. 20330

CHIEF OF STAFF
Department of the Air Force
Pentagon
Washington, D. C. 20330

THE JUDGE ADVOCATE GENERAL
United States Air Force
Washington, D. C.

MAJOR FORREST W. THOMAS
Staff Judge Advocate
Richards-Gebaur AFB, Missouri

COLONEL HEWITT E. LOVELACE, JR.
Commander, 1840th Air Base Wing
Richards-Gebaur AFB, Missouri

COLONEL RUSSELL A. STANLEY
Military Judge
Richards-Gebaur AFB, Missouri
DEFENDANTS

COMPLAINT FOR DECLARATORY JUDGMENT AND INJUNCTIVE RELIEF

Plaintiff, for his complaint against the above-named defendants, alleges:

FIRST CAUSE OF ACTION

1. This case arises under the Fifth and Sixth Amendments to the Constitution, and 10 U.S.C. §§ 827, 838, and 846. The Court has jurisdiction of this action pursuant to 28 U.S.C. §§ 1331, 1361, 2201, and 2202, 10 U.S.C. §§ 827, 838, 846 and the Fifth and Sixth Amendments to the Constitution.

2. Plaintiff is a Master Sergeant in the United States Air Force with an officially recorded outstanding record of service, whose enlistment expired on July 10, 1973. Plaintiff is presently under pre-trial confinement at Richards-Gebaur Air Force Base, Grandview, Missouri, awaiting court-martial on three charges alleging violations of Articles 92, 134, and 81 (conspiracy to violate Article 134), Uniform Code of Military Justice (hereinafter UCMJ).

3. The defendant, John L. McLucas, as Secretary of the Air Force is administrative head of the Air Force. The defendant Chief of Staff, USAF, is the highest military officer in the chain of command in the Air Force, and was responsible for denying to plaintiff's civilian defense counsel access to the documents upon which the charges against the plaintiff are based. The defendant, Judge Advocate General, United States Air Force, was responsible for denying permission to plaintiff's military defense counsel to represent the plaintiff in collateral matters arising out of the charges brought against him. The defendant Major Forrest W. Thomas is the Staff Judge Advocate at the 1840th Air Base Wing, Richards-Gebaur Air Force Base, and was responsible for issuing the Advice to the Convening Authority to institute court-martial proceedings against the plaintiff. The defendant Colonel Hewitt E. Lovelace, Jr. is the Commander of the 1840th Air Force Wing, Rich-

ards-Gebaur Air Force Base in Grandview, Missouri, and was the Convening Authority who directed that criminal charges against plaintiff be referred to a rehearing by a general court-martial. The defendant Colonel Russell A. Stanley is the military judge who has been assigned to preside at the court-martial of the plaintiff.

4. Plaintiff was arrested and incarcerated by the Air Force on July 2, 1971, and has been in continual incarceration since that date. He originally was tried and convicted on charges alleging violations of Articles 81, 92, and 134, Uniform Code of Military Justice (herein called "UCMJ"), and was sentenced to dishonorable discharge, confinement at hard labor for fifteen years, total forfeiture of pay and allowances, and reduction to the lowest enlisted grade. The conviction and sentence were reversed on October 5, 1972 by the United States Air Force Court of Military Review (*United States* v. *De Champlain*, ACM 21034) on the grounds that alleged inculpatory statements of the plaintiff were involuntarily obtained and improperly admitted at trial. On February 16, 1973, the United States Court of Military Appeals affirmed the decision of the Air Force Court of Military Review, 44 CMR 150.

5. On May 25, 1973, the defendant Major Thomas, as Staff Judge Advocate, transmitted his Advice to the new Convening Authority, defendant Colonel Lovelace, recommending that the charges against the plaintiff, with certain amendments of the specifications, be referred to a rehearing by a general court-martial.

6. On May 31, 1973, the charges against the plaintiff were served upon him and were referred to a court-martial by defendant Colonel Lovelace. One of the three charges referred to therein alleges violations of Article 134, UCMJ, 10 U.S.C. § 934, and a second charge alleges violations of Article 81 UCMJ, 10 U.S.C. § 881, for conspiracy to violate Article 134.

7. Plaintiff raised by motion the substantive matters specified *infra*, before defendant Colonel Stanley at Article 39(a), UCMJ pre-trial sessions on July 16-20, 1973 and September 5-7, 1973. All such motions were

decided adversely to the plaintiff. Plaintiff also raised the same substantive matters before the United States Court of Military Appeals, in a Petition for Extraordinary Relief. The Petition was denied in all respects on September 5, 1973 (Misc. Docket 73-46).

8. On March 20, 1973, the United States Court of Appeals for the District of Columbia Circuit, in an opinion by Justice Tom Clark, sitting by designation, held Article 134, UCMJ to be unconstitutionally vague. *Avrech* v. *Secretary of the Navy*, 477 F.2d 1237. On April 18, 1973, the United States Court of Appeals for the Third Circuit also held Article 134 unconstitutional. *Levy* v. *Parker*, 478 F.2d 772. And on August 3, 1973, a separate panel of the District of Columbia Circuit concurred with the *Averch* and *Levy* panels and held Article 134 to be unconstitutional. *Hooper* v. *Laird*, No. 72-1198, —— F.2d ——.

9. On September 5, 1973, the plaintiff moved before the defendant Colonel Stanley for dismissal of the charges under Article 134. This motion was denied without opinion. The Air Force has refused to withdraw the charges based on Article 134.

10. On April 11, 1973, the Air Force Court of Military Review refused to declare Article 134, UCMJ unconstitutionally vague. *United States* v. *Duncan*, ACM 21,262 en banc). On April 2, 1973, in the case of *United States* v. *Unrue*, No. 26,552, the United States Court of Military Appeals ruled in an unpublished order that it would not follow the decision of the court in *Avrech* v. *Secretary of the Navy*, *supra*. A copy of that order is attached hereto as Exhibit "B."

11. In the absence of relief from this Court, plaintiff will be required to submit to a court-martial on unconstitutional charges. Requiring the plaintiff to go to trial on these unconstitutional charges, joined with other charges as shown in Exhibit "A," will seriously prejudice plaintiff's right to a fair trial on the charges brought under sections of the Uniform Code of Military Justice other than Article 134.

12. The Uniform Code of Military Justice does not recognize a right to bail or release of convicted defend-

ants pending appeal. Accordingly, in the event plaintiff is convicted under the Article 134 charges and is sentenced to a period of confinement on those charges, plaintiff will have served all or a good portion of any sentence in imprisonment prior to exhaustion of his appellate remedies in the military courts. This would be in addition to the over two years that plaintiff already has spent in confinement waiting for trial, appeal, and retrial.

13. Accordingly, unless the defendants are restrained from trying the plaintiff on charges under Article 134, the plaintiff will suffer irreparable injury.

14. The plaintiff has exhausted his administrative remedies and has no remedy at law.

SECOND CAUSE OF ACTION

15. Plaintiff repeats and realleges the contents of Paragraphs 1-7, *supra.*

16. On July 5, 1973, plaintiff directly and through his military counsel retained Leonard B. Boudin, Esq., a member of the New York State, United States Supreme Court, and other federal bars, including the bar of this court as his civilian defense counsel. On July 6, 1973 and repeatedly thereafter plaintiffs by counsel verbally and in writing requested of government trial counsel that the entire record of the prior trial, including the charges and the documents upon which petitioner's original conviction was based and upon which the present case is based, be delivered to the plaintiff's civilian defense counsel for examination and study by the latter and by members of his staff and technical consultants. Plaintiff requested that a copy of the same record be made available to him personally so that he could study it, take notes, and consult with his counsel for the purposes of preparing his defense.

17. The defendants McLucas and Lovelace declined to make any of the "classified" portions of this information available to plaintiff's civilian defense counsel from July to September, 1973 and stated that plaintiff's civilian defense counsel would have to be "cleared" by the Air

Force and by other agencies of the federal government. The defendant Stanley acquiesced in that position of the Air Force and declined to direct that copies of the entire record of the first trial be given to the plaintiff and to the civilian counsel of his choice.

18. On or about September 20, 1973, the Air Force trial counsel (prosecutor) advised the plaintiff's military counsel of a final decision by the Air Force as follows:

(a) With respect to approximately fifteen documents introduced in evidence at plaintiff's first trial, plaintiff's civilian counsel would not be given copies or even access to the said documents or to that part of the trial record relating thereto. The Air Force has advised that it would seek to avoid this problem by not introducing the said documents into evidence at the new trial.

(b) With respect to nine other documents, the plaintiff's civilian defense counsel would not be allowed to receive copies of them (or the transcript references as to subject), but would be permitted to look at the documents under severe restrictions. He would not be able to examine or retain copies of the documents in his office, but would be required to examine them in the presence of officials holding appropriate security clearances (including military defense counsel), and at a location chosen by the government. He would not be entitled to retain notes with respect to classified matters from such documents for use in his office in preparation for trial, but would have to surrender such notes to be "secured" by the government. Moreover, he would have to submit *all* his notes to government personnel for decision as to whether or not they relate to classified material and must be "secured." Finally, he could not discuss classified information with associates or consultants in his office or home; he could only discuss such information in a designated government office and then only with individuals with the proper security clearances. Nor could the plaintiff himself retain his classified notes for delivery to his civilian counsel or otherwise make written reference to the classified exhibits or to other relevant sections of the record.

(c) With respect to the nine documents referred to in sub-section (b), *supra*, no other members of plaintiff's civilian defense team, including associate attorneys, expert consultants and potential expert witnesses, would be permitted to observe such documents or even to receive second-hand information about their contents, with the exception of one associate attorney and one legal secretary of the civilian defense counsel.

19. The above-stated restrictions were dictated by the defendant Chief of Staff of the United States Air Force in a telegram sent on September 7, 1973 to the defendant Convening Authority, A copy of that telegraphic message is attached hereto as Exhibit "C."

20. As a result of the above-stated restrictions, even the full charge sheet was not disclosed to civilian defense counsel; only after strong objection by the defense to the "classified" designation of all the charge sheets was an "expurgated" version supplied to the defense.

21. The Air Force has crossed out from the charge sheet references to certain documents to which access has been denied to the plaintiff's civilian defense counsel. The Air Force now takes the position that these documents must be withdrawn from the charges. See letter of September 21, 1973 from Captain Peter N. Rogers, military trial counsel, to Leonard B. Boudin, civilian defense counsel, attached hereto as Exhibit "D." The charge sheet attached hereto as Exhibit "A" contains the markings by which the references to documents were crossed out.

22. Plaintiff presented his demands for unlimited access and retention of documents by himself and his civilian defense counsel, and for copies of all relevant documents and of the entire record of the first trial, to the defendant Colonel Stanley in correspondence and in pretrial arguments at the Article 39(a) sessions in July and September, 1973. Plaintiff and his counsel voluntarily suggested a protective order against disclosure to unauthorized persons until the public trial to which he is entitled. Colonel Stanley ruled adversely to plaintiff, stating that the defense would be required to comply with all of the above restrictions, as well as all other

unspecified Air Force security regulations. (There are however no Department of Defense or Air Force regulations restricting the right of court-martial defense counsel to relevant exhibits.) Colonel Stanley further ruled that the Air Force was required to "clear" (using its normal standards and procedures) only one (1) associate attorney or law clerk of the civilian counsel, who is the chief defense counsel, and only one (1) secretary/typist, and that no other personnel from the civilian defense counsel's law firm or any of his potential expert witnesses or consultants may know of the "classified" information in the case. Thus, several law partners and associates of the civilian defense counsel, and several technical experts and consultants requested by the defense, are being totally denied access.

23. These actions by the defendants violate the plaintiff's right to a fair trial, to the effective assistance of counsel and to due process of law, and interfere with his ability to obtain witnesses and other evidence guaranteed him by the Fifth and Sixth Amendments to the Constitution of the United States and Articles 27, 38 and 46 of the UCMJ, 10 U.S.C. §§ 827, 838, 846.

24. In the absence of relief from this Court, plaintiff will be required to submit to a court-martial under circumstances presenting clear, unmistakable, and substantial interferences with his constitutional rights. The Uniform Code of Military Justice does not recognize a right to bail or release of convicted defendants pending appeal. Accordingly, in the event plaintiff is convicted and is sentenced to a period of confinement on those charges, plaintiff will have served all or a good portion of any sentence in imprisonment prior to exhaustion of his appellate remedies in the military courts and possible return to the federal civilian courts. This would be in addition to the over two years that plaintiff already has spent in confinement waiting for trial, appeal, and retrial.

25. Accordingly, unless the defendants are restrained from trying the plaintiff under the circumstances described herein, plaintiff will suffer irreparable injury.

26. The plaintiff has exhausted his administrative remedies and has no remedy at law.

THIRD CAUSE OF ACTION

27. Plaintiff repeats and realleges the contents of paragraphs 1-7, *supra.*

28. The original court-martial was conducted in part in closed sessions, particularly when the "classified" documents which are the basis of this prosecution were introduced in evidence and were the subject of testimony, and when so-called confidential informants testified or were referred to in testimony. Plaintiff moved at the Article 39(a), UCMJ hearings on July 16, 1973 and on September 5, 1973 for an order directing that plaintiff be given a public trial, open to spectators and members of the press regardless of security clearance and their so-called "need to know."

29. These motions were denied by the Military Judge, defendant Colonel Stanley, pursuant to Paragraph 53(e) of the Manual for Courts-Martial. He ruled that sessions of the trial would be closed when classified matters in the case were being disclosed or discussed.

30. The denial of plaintiff's demand for a public trial violates his constitutional right to a public trial under the Fifth and Sixth Amendments to the Constitution of the United States. Paragraph 53(e) of the Court-Martial Manual, as applied by the Military Judge, violates those constitutional provisions and Article 36(a) of the UCMJ.

31. In the absence of relief from this Court, plaintiff will be required to submit to a court-martial under circumstances presenting clear and unmistakable interferences with his constitutional rights. The Uniform Code of Military Justice does not recognize a right to bail or release of convicted defendants pending appeal. Accordingly, in the event plaintiff is convicted and is sentenced to a period of confinement on these charges, plaintiff will have served all or a good portion of any sentence in imprisonment prior to exhausting of his appellate remedies in the military courts and return to the federal civilian courts. This would be in addition to the over two years that plaintiff already has spent in confinement waiting for trial, appeal, and retrial.

32. Accordingly, unless the defendants are restrained from trying the plaintiff under the circumstances described herein, the plaintiff will suffer irreparable injury.

33. The plaintiff has exhausted his administrative remedies and has no remedy at law.

FOURTH CAUSE OF ACTION

34. Plaintiff repeats and realleges the contents of paragraphs 1-7, *supra.*

35. Article 27, UCMJ, 10 U.S.C. § 827, requires the assignment of military defense counsel for general and special courts-martial.

36. Air Force Regulation 110-3, paragraph 2, as interpreted by the defendant Judge Advocate General, USAF, forbids a military lawyer who has been assigned by The Judge Advocate General as military defense counsel to appear as counsel for the accused in civil courts in collateral proceedings arising out of the court-martial charges (such as the instant proceedings), unless special permission is obtained from the Judge Advocate General, USAF.

37. On July 23, 1973, plaintiff's two assigned military defense counsel, Captain Byron D. Baur, USAF, and Captain Alessandro J. Ranciglio, USAF, requested permission to represent the plaintiff in collateral proceedings which they felt were essential to protect the plaintiff's constitutional and statutory rights. A copy of their letter of request is attached as Exhibit "E" hereto.

38. On July 31, 1973, Brig. Gen. Harold R. Vague, the Assistant Judge Advocate General, USAF, denied the request of the plaintiff and his military defense counsel. A copy of the letter from General Vague to plaintiff's chief military defense counsel, Capt. Byron D. Baur, is attached as Exhibit "F" hereto.

39. Plaintiff requires the assistance of his military defense counsel to assist in the preparation of collateral proceedings such as the instant proceeding, and also a possible proceeding to be brought in the United States District Court in Missouri challenging the plaintiff's

pre-trial confinement. Considerations of practical convenience and financial resources make it difficult if not impossible for plaintiff to retain civilian counsel to represent him fully and adequately in all such matters. Failure to receive such assistance of military counsel will seriously prejudice the plaintiff's ability to present a full defense to the criminal charges that have been brought against him.

40. Accordingly, unless the defendants are restrained from forbidding the plaintiff's military defense counsel from representing him in civil collateral proceedings arising from the criminal charges brought against him, the plaintiff will suffer irreparable injury.

41. The military courts have held that they lack jurisdiction to decide the question of military defense counsel appearing in civilian courts. *Johnson* v. *The Judge Advocate General of the United States Army*. 45 CMR 294 (1972). In the instant case, the defendant Judge Advocate General, USAF, has denied relief. Thus, the plaintiff has exhausted his available administrative remedies and has no remedy at law.

WHEREFORE, the plaintiff requests the following relief:

1. That the Court issue a declaratory judgment:

A. That Article 134, UCMJ, 10 U.S.C. § 934, is unconstitutionally vague, in violation of the due process clause of the Fifth Amendment to the Constitution.

B. That the actions of the defendants in proceeding to trial by court-martial of the plaintiff without granting the plaintiff and his civilian counsel full and unlimited access, subject to a protective order, to all documents relevant and material to issues to be tried, including the receipt of a copy of the entire record of plaintiff's prior court-martial and the very documents upon which the present and past charges are based, violate plaintiff's Fifth and Sixth Amendment rights to due process of law, a fair and speedy trial, the right to call and cross-examine witnesses, and the effective assistance of counsel of his choice.

C. That the actions of the defendants in proceeding to trial by court-martial of the plaintiff pursuant to an order whereby the trial will be closed to the public and the press whenever classified matters in the case are disclosed or discussed, violate plaintiff's Fifth and Sixth Amendment rights to due process of law and to a fair and speedy public trial.

D. That Air Force Regulation 110-3, Paragraph 2, on its face and as applied, violates the plaintiff's Fifth and Sixth Amendment rights to due process of law, to a fair trial, and to adequate assistance of counsel.

2. That the Court issue a preliminary and permanent injunction enjoining the defendants from prohibiting the plaintiff's military defense counsel from rendering legal assistance and appearing for the plaintiff in matters before civil courts of the United States on collateral issues arising from the criminal charges brought against the plaintiff;

3. That the Court issue a preliminary and a permanent injunction:

A. Enjoining prosecution of the plaintiff pursuant to charges 1 and 3 of the present charge sheet, which allege violations of Article 134, UCMJ, 10 U.S.C. § 934, and Article 81, UCMJ, 10 U.S.C. § 881 (conspiracy to violate Article 134).

B. Enjoining prosecution of the plaintiff pursuant to any and all charges, unless full and unlimited access to all documents relevant and material to the case, including receipt of copies of the entire record of the proceedings at plaintiff's first court-martial and the documents upon which the present and past charges are or have been based, is granted immediately to plaintiff, his chosen civilian defense counsel, and such legal associates and assistants as are appropriate to that counsel's adequate preparation for trial.

C. Enjoining prosecution of the plaintiff pursuant to any and all charges unless a fully open public trial is immediately guaranteed to the plaintiff.

4. Granting such other and further relief as this Court may deem appropriate.

/s/ Leonard B. Boudin
LEONARD B. BOUDIN
ERIC M. LIEBERMAN
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September 26, 1973.

[Title Omitted in Printing]

VERIFICATION

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

LEONARD B. BOUDIN, being duly sworn, deposes and says:

I am one of the attorneys for the plaintiff in the above action. I have read the foregoing Complaint and I verily believe the facts stated herein to be true.

/s/ Leonard B. Boudin
LEONARD B. BOUDIN

Subscribed and sworn to before me,
this 26th day of September, 1973.

/s/ Herbert Jordan
Notary Public
HERBERT JORDAN
Notary Public, State of New York
No. 31-4506453 Qual. in N. Y. County
Commission Expires March 30, 1975

CHARGE I Violation of the Uniform Code of Military Justice, Article 81.

Specification: In that MASTER SERGEANT RAYMOND G. DE CHAMPLAIN, United States Air Force, Detatchment 8, 1131 Special Activities Squadron, Headquarters Command, being a member of the United States Air Force, did, at Bangkok, Thailand, on or about 6 June 1971, conspire with another to commit an offense under Article 134, Uniform Code of Military Justice, to wit: to wrongfully communicate to an agent of a foreign government, then known by the said MASTER SERGEANT RAYMOND G. DE CHAMPLAIN to be an agent of a foreign government, information known by the said Master Sergeant Raymond G. deChamplain to have been classified as affecting the security of the United States in violation of Section 783(b), Title 50, United States Code, and in order to effect the object of the conspiracy, the said Master Sergeant Raymond G. de Champlain did, on 2 July 1971, wrongfully attempt to communicate to an agent of a foreign government information which was then known by the said Master Sergeant Raymond G. de Champlain to have been classified as affecting the security of the United States, to wit:

a. A four page typewritten copy of Top Secret Department of State Memorandum of Conversation, dated 9 June 1971, Subject: Meeting between Ambassador Unger and Secretary of the Air Force, Robert C Seamans, Jr.

b. A two page typewritten copy of Top Secret electrical message 300400Z JUN 71 from CINCPAC to RUEKJCS/JCS. Subject: Military Ceiling in Thailand.

c. A two page reproduced copy of Top Secret SPECAT electrical message 170152Z APR 71, from CINCUSARPAC to RUEOCP/COPO WASH DC, Subject: PSYOP OFF FOR 46TH SF CO (ABN), APO 96261.

d. A five page reproduced copy of Secret electrical message 201230Z JUN 71 from COMUSMACTHAI (ADVANCED) PHITSANULOKE THAI to RUEFHQA/CSAF/XOOW/XCOS, Subject: Pave Coin Major Aircraft Accident Report.

e. A Confidential Airgram, dated 15 June 1971 from American Embassy, Bangkok to Department of State, Subject: Vietnamese Refugees.

f. A reproduced copy of Confidential Memorandum for Bureau of Narcotics and Dangerous Drugs, US Embassy, Bangkok, Thailand, Subject: Opium Traffic in Burma.

g. A reproduced copy of Confidential electrical message 280513 JUN 71 from COMUSMACTHAI to CINCPAC, Subject: RTG PSYOP Programs.

h. A two page Confidential electrical message 300130Z JUN 71 from 5AF FUCHU AS JAPAN to RUHHABA/CINCPACAF, Subject: Request for Area Clerance Col Titus plus One.

i. A confidential Department of State Memorandum of Conversation dated June 14, 1971.

j. A four page copy of Confidential electrical message 270114Z JUN 71 from CINCPAC, Subject: Planning for Redeployment of RTAVF.

k. A two page reproduced copy of Confidential DA Form 2496, dated 25 June 1971, from TMAG to AC of S, J-1.

CHARGE II: Violation of the Uniform Code of Military Justice, Article 92.

Specification: In that MASTER SERGEANT RAYMOND G. DE CHAMPLAIN, United States Air Force, Detatchment 8, 1131 Special Activities Squadron, Headquarters Command, did, at Bangkok, Thailand, on or about 6 June 1971, violate a lawful general regulation, to wit: paragraph 2, Air Force Regulation 205-57, 14 October 1963, by failing to report to his commander or supervisor, a personal contact with a

BEST COPY AVAILABLE

EXHIBIT "A"

representative of a foreign government, known by the said Master Sergeant Raymond G. deChamplain to have been a representative of a foreign government, whose activities are hostile to, against the best interest of or may be harmful to the United States.

CHARGE III: Violation of the Uniform Code of Military Justice, Article 134.

Specification 1: In that MASTER SERGEANT RAYMOND G. DECHAMPLAIN, United States Air Force, Detatchment 8, 1131 Special Activities Squadron, Headquarters Command, for the purpose of obtaining information respecting the national defense, having reason to believe the information was to be used to the injury of the United States or to the advantage of a foreign nation, did, at Bangkok, Thailand, on or about 30 June 1971, wrongfully and in violation of Section 793(b), Title 18, United States Code, copy classified security documents connected with the national defense, to wit:

a. A four page Top Secret Department of State Memorandum of Conversation, dated 9 June 1971, Subject: Meeting between Ambassador Unger and Secretary of the Air Force, Robert C Seamans, Jr.

b. A two page Top Secret electrical message 300400Z JUN 71 from CINCPAC to RUEKJCS/JCS, Subject: Military Ceiling in Thailand.

c. A Top Secret electrical message 240231Z JUN 71 from CINCPAC to RHMSMVA/CHMEDTC, Subject is Classified Top Secret.

d. A two page Top Secret SPECAT electrical message 170152Z APR 71, Subject: PSYOP OFF FOR 46TH SF CO (ABN), APO 96261.

e. A five page Secret electrical message 201230Z JUN 71 from COMUSMACTHAI (ADVANCED) PHITSANULOKE THAI to RUEFHQA/CSAF/XOOW/XOOS, Subject: Pave Coin Major Aircraft Accident Report.

f. A Confidential electrical message 280513Z JUN 71 from COMUSMACTHAI to CINCPAC, Subject: RTG PSYOP Programs.

Specification 2: In that MASTER SERGEANT RAYMOND G. DECHAMPLAIN, United States Air Force, Detatchment 8, 1131 Special Activities Squadron, Headquarters Command, having lawful access to classified security documents relating to the national defense and having reason to believe the information contained in these documents could be used to the injury of the United States or to the advantage of a foreign nation, did, at Bangkok, Thailand, on 2 July 1971, wrongfully and in violation of Section 793(d) of Title 18, United States Code, willfully attempt to deliver to a person not authorized to receive them, copies of classified security documents relating to the national defense, described as follows:

a. A four page typewritten copy of Top Secret Department of State Memorandum of Conversation, dated 9 June 1971, Subject: Meeting between Ambassador Unger and Secretary of the Air Force, Robert C Seamans, Jr.

b. A two page typewritten copy of Top Secret electrical message 300400Z JUN 71 from CINCPAC to RUEKJCS/JCS, Subject: Military Ceiling in Thailand.

c. A reproduced copy of Top Secret electrical message 240231Z JUN 71 from CINCPAC to RHMSMVA/CHMEDTC.

d. A two page reproduced copy of Top Secret SPECAT electrical message 170152Z APR 71 from CINCUSARPAC to RUEAOCP/COPO WASH DC, Subject: PSYOP OFF FOR 46TH SF CO (ABN), APO 96261.

e. A five page reproduced copy of Secret electrical message 201230Z JUN 71 from COMUSMACTHAI (ADVANCED) PHITSANULOKE THAI to RUEFHQA/CSAF/XOOW/XOOS, Subject: Pave Coin Major Aircraft Accident Report.

f. A Confidential airgram, dated 15 June 1971 from American Embassy,

g. A reproduced copy of Confidential Memorandum for Bureau of Narcotics and Dangerous Drugs, US Embassy, Bangkok, Thailand, Subject: Opium Traffic in Burma.

h. A reproduced copy of Confidential electrical message 280513Z JUN 71 from COMUSMACTHAI to CINCPAC, Subject: RTG PSYOP Programs.

i. A two page Confidential electrical message 300130Z JUN 71 from 5AF FUCHU AS JAPAN to RUHHABA/CINCPACAF, Subject: Request for Area Clearance Col Titus plus one.

j. A Confidential Department of State Memorandum of Conversation dated June 14, 1971.

k. A four page copy of Confidential electrical message 270114Z JUN 71 from CINCPAC, Subject: Planning for Redeployment of RTAVF.

l. A two page reproduced copy of Confidential DA Form 2496, dated 25 June 1971 from TNAC to AC of S, J-1.

EXHIBIT B

UNITED STATES COURT OF MILITARY APPEALS

No. 26,552

UNITED STATES, APPELLEE

v.

Specialist Four TERRY W. UNRUE (SS #233-80-9730), APPELLANT

ORDER

With due regard for the position of the United States Court of Appeals for the District of Columbia in Averch v. Secretary of the Navy, —— F. 2d —— (D. C. Cir. 1973), this Court considers itself bound by the decision of the United States Supreme Court that the legislative predecessor of Article 134, Uniform Code of Military Justice, 10 U.S.C. § 934, was constitutional. Dynes v. Hoover, 61 U.S. 65, 15 L. Ed. 838, 20 How. 65 (1858). See also United States v. Frantz, 2 U.S.C.M.A. 161, 7 C.M.R. 37 (1953); United States v. Sadinsky, 14 U.S. C.M.A. 563, 34 C.M.R 343 (1964); and United States v. Pitosi, 20 U.S.C.M.A. 601, 44 C.M.R. 31 (1971).

Accordingly, it is, by the Court, this 2d day of April, 1973,

ORDERED:

That the defense "Motion for Enlargement of the Scope of the Granted Issue" be, and the same hereby is denied; and it is further

ORDERED:

That the "Motion for Enlargement of the Filing of the Final Brief Under Rule 43 of the Granted Issue," be, and the same hereby is, granted, up to and including April 6, 1973.

Judge Duncan would grant the motion and order oral argument on the issue presented.

For the Court

/s/ Michael W. Katen
MICHAEL W. KATEN
Clerk

EXHIBIT C

7 Sep 73 0255

CZCHWA 241
PTTUZF DW RUEBDUA2898 2492032-UUUU—
RUWTWHA.
ZNR UUUUUU
P R 061813Z SEP 73 ZFD
FM CSAF WASH DC
TO RUKTAAA/1840 ABWG RICHARDS-GEBAUR
AFB MO
INFO RUWTFJA/USAF TRIAL JUDICIARY
FOURTH CIRCUIT LOWRY CO
RUKTAAA/AFCS RICHARDS-GEBAUR AFB MO
BT

B+BT

FOR JA. SUBJECT: ACCESS TO CLASSIFIED MATERIAL FOR CIVILIAN DEFENSE COUNSEL IN GENERAL COURT-MARTIAL OF U.S. V. MSGT RAYMOND G. DECHAMPLAIN. THIS MESSAGE IN FIVE PARTS.

PART I: DECISIONS OF THE UNITED STATES COURT OF MILITARY APPEALS REQUIRE THAT THE ACCUSED'S RIGHT TO REPRESENTATION BEFORE COURTS-MARTIAL BY CIVILIAN COUNSEL INCLUDE RIGHT OF CIVILIAN COUNSEL TO HAVE ACCESS TO ALL PERTINENT EVIDENCE EVEN IN A TRIAL INVOLVING CLASSIFIED INFORMATION.

PART II: TO PROVIDE THIS RIGHT TO THE ACCUSED IN SUBJECT CASE, AUTHORITY IS HEREBY GRANTED TO PERMIT ACCESS BY THE INDIVIDUALS NAMED IN PART V BELOW TO THE FOLLOWING CLASSIFIED DOCUMENTS ALLEGED IN THE SPECIFICATION OF CHARGES REFERRED FOR REHEARING IN THIS CASE TOGETHER WITH ALL PORTIONS OF THE ORIGINAL RECORD OF TRIAL WHICH RELATE TO THOSE DOCUMENTS:

TOP SECRET ORIGINATOR	SUBJECT	DATE
US EMBASSY, BANGKOK	MEMO OF CONVERSATION	
POMIL AMEMB	BETW AMB UNGER AND DR SEAMANS (SAF)	9 JUN 71

SECRET ORIGINATOR	SUBJECT	DATE
CINCPAC/J3B 6	SUBJECT SECRET	240231Z JUN 71
COMUSMACTHAI (ADVANCED)	PAVE COIN MAJOR A/C	201230Z JUN 71
PHITSANULOKE, THAI	ACCIDENT REPORT	

CONFIDENTIAL ORIGINATOR	SUBJECT	DATE
CINUSARPAC/GPPPE-MO	PSYOP OFF FOR 46TH SF CO (ABN), APO 96261	170152Z APR 71
USMACTHAI/TNAG	DISPOSITION FORM: DEVELOPMENTS IN THAI STRENGTH REPORT	25 JUN 71

ORIGINATOR	SUBJECT	DATE
AM EMBASSY, BANGKOK/POL 4	VIETNAMESE REFUGEES (AIRGRAM)	15 JUN 71
AM EMBASSY, BANGKOK	MEMO OF CONVERSATION-SIRI UDORN HOTEL, UDORN, THAI	14 JUN 71
5 AF, FUCHU AS, JAPAN/CS	REQUEST FOR AREA CLEARANCE-COL TITUS PLUS ONE	3001302 JUN 71
CINCPAC OASD: ISA	PLANNING FOR REDEPLOYMENT OF RTAVF	270114Z JUN 71

PART III: IN THE DISCRETION OF THE CONVENING AUTHORITY, THE SPECIFICATION OF CHARGES REFERRED FOR REHEARING MAY BE

AMENDED TO DELETE THEREFROM ALLEGATIONS OF DOCUMENTS TO WHICH ACCESS BY CIVILIAN DEFENSE COUNSEL IS NOT GRANTED BY THIS MESSAGE.

PART IV: ACCESS TO THE DOCUMENTS AND OTHER CLASSIFIED MATERIAL DESCRIBED IN PART II ABOVE IS GRANTED ONLY ON THE FOLLOWING CONDITIONS: (A) THE DOCUMENTS MAY NOT BE RELEASED TO CIVILIAN COUNSEL; (B) THEY MAY SEE AND READ THE DOCUMENTS ONLY IN THE PRESENCE OF ONE HOLDING THE APPROPRIATE SECURITY CLEARANCE; (C) THEY MAY NOT MAKE COPIES OF THE DOCUMENTS; (D) NO WRITTEN NOTES MADE BY THEM WITH RESPECT TO CLASSIFIED INFORMATION CONTAINED IN SAID DOCUMENTS MAY BE REMOVED FROM AIR FORCE CONTROL; AND (E) THEY WILL BE ADVISED OF APPLICABLE LAWS AND PENALTIES FOR UNAUTHORIZED RELEASE OF CLASSIFIED INFO. TRIAL COUNSEL WILL AT THE EARLIEST OPPORTUNITY REQUEST THE MILITARY JUDGE TO INFORM CIVILIAN DEFENSE COUNSEL IN OPEN COURT OF THE CONDITIONS IMPOSED AND OBTAIN THEIR ACKNOWLEDGEMENT THEREOF, AND IF PRACTICABLE THEIR AGREEMENT TO COMPLY WITH SUCH CONDITIONS.

PART V: AUTHORIZATION TO PERMIT ACCESS TO THE DOCUMENTS AND OTHER CLASSIFIED MATERIAL DESCRIBED IN PART II ABOVE IS LIMITED TO THE FOLLOWING INDIVIDUALS: (A) MR LEONARD B. BOUDIN; (B) MR MICHAEL KRINSKI; AND (C) MR JEROME J CHARLES.

BT

#2392

EXHIBIT D

DEPARTMENT OF THE AIR FORCE

HEADQUARTERS UNITED STATES AIR FORCE
Washington, D. C.

21 Sep 73 [DoD Emblem]

Mr. Leonard B. Boudin
Rabinowitz, Boudin & Standard
Attorneys at Law
30 East 42nd Street
New York, NY 10017

Dear Mr. Boudin:

Attached please find the requested message and copy of charges. The subparagraphs lined out in red relate to documents to which you have not been granted access. It is the position of the government that these subparagraphs must be withdrawn from the charges.

Sincerely,

/s/ Peter N. Rogers
PETER N. ROGERS
Capt, USAF
Trial Counsel
4 Judiciary Circuit

2 Atchs
1. Msg, CSAF, 061813Z Sep 73
2. Charges, U.S. v. Dechamplain

EXHIBIT E

DEPARTMENT OF THE AIR FORCE

HEADQUARTERS UNITED STATES AIR FORCE
Washington, D. C.

23 July 1973 [DoD Emblem]

Reply to
Attn of:

Subject: Representation of Our Court-Martial Client in Actions Collateral to His Court-Martial; U. S. v. MSgt Raymond G. DeChamplain

To: The Judge Advocate General
United States Air Force
Washington DC

1. Reference my earlier letter, as co-signer with Captain James R. Crassweller, on the same basic subject, dated 7 May 1973, addressed to Colonel George M. Wilson, Hq USAF (JAJD), for presentation to The Judge Advocate General. It is my understanding that Captain Crassweller received a reply, dated 21 May 1973, signed on behalf of The Judge Advocate General by Colonel W. M. Burch II, Director, USAF Judiciary, as well as telephonic reply and instructions from Colonel Burch's office. It is my further understanding that these replies to Captain Crassweller denied our joint request, insofar as it applied to him. I received no reply directed to me, or a copy of the reply to Captain Crassweller. Therefore, I am re-initiating my request by means of this letter, and in addition requesting that my Assistant Defense Counsel, Captain Alexandro J. Ranciglio, be likewise freed to participate as counsel in actions on behalf of our client in all legal actions relating to the defense of our client, regardless of the tribunal involved.

2. Captain Ranciglio and I are both duly licensed attorneys, admitted to practice before the Federal District Courts of our home states. In Captain Ranciglio's case, he is admitted to practice before the Federal District

Court for the Western District of Missouri, which is the very court in which any action on behalf of our client might well be brought. It is only because of the prohibitions against judge advocates acting as counsel in such actions, contained in paragraph 2, AFR 110-3, that we are denied permission to seek collateral relief, where appropriate, on behalf of our client. As a result, our client, who is severely in debt, may have to pay for the services of his civilian counsel to come to Missouri to bring such action, even though his military lawyers are fully qualified under the appropriate court's rules and are already on-the-scene and very familiar with the case.

3. Presently, as a result of rulings made by the Military Judge in an Article 39(a) UCMJ, pre-trial hearing held 16-20 July 1973, at Richards-Gebaur AFB, Missouri, several important issues, some of constitutional magnitude, face the defense. Requests for relief in the form of "collateral attack" in federal district court or higher federal court, may be appropriate. The individual civilian defense counsel, Mr. Leonard B. Boudin, of New York City, has specifically requested that Captain Ranciglio and I act as the accused's counsel in bringing such "collateral attacks", if they are deemed necessary. Therefore, we hereby request the authority to appear as counsel and to represent our client in any judicial tribunal or other appropriate proceedings, when the outcome of the action involved relates directly to the military charges pending against our accused, or when the action involved will affect our accused's situation as a criminal defendant (such as Habeas Corpus actions seeking relief from pre-trial confinement or restriction). We specifically request waiver from the prohibitions of paragraph 2, AFR 110-3, or, alternatively, the issuance of an Opinion of The Judge Advocate General, that that paragraph abridges the accused's right to counsel under Articles 27 and 38, UCMJ, 10 U. S. Code Sec. 827, and/or the Sixth Amendment to the Constitution of the United States.

4. We respectfully request a prompt determination of this matter and written reply, in order that we may

know whether we are to be permitted to act as counsel to our client in such proceedings in the near future. We further request that the reply address itself to the propriety of our taking similar action on behalf of other accuseds for whom we have been appointed military defense counsel.

Respectfully submitted,

BYRON D. BAUR
Captain, USAF
Defense Counsel
4 Judiciary Circuit
Lowry AFB CO 80230

1 Atch
DC Ltr dtd 7 May 73

Cy to: Capt A. J. Ranciglio (ADC)
Mr. Leonard B. Boudin
MSgt Raymond G. DeChamplain

EXHIBIT F

DEPARTMENT OF THE AIR FORCE

HEADQUARTERS UNITED STATES AIR FORCE
Washington, D. C.
20314

31 Jul 1973 [DoD Emblem]

Reply to
Attn of: JA

Subject: Request for Authority to Appear in District Court

To: 4th Judicial Circuit (Capt Baur)

1. Reference your letter, 23 July 1973, subject "Representation of Our Court-Martial Client in Actions Collateral to His Court-Martial; U.S. v. MSgt Raymond G. DeChamplain".

2. You have earlier been advised that you are not authorized to practice in federal district court incident to your representation of military personnel under Article 27, UCMJ. No exception to that principle applies in the case of Master Sergeant DeChamplain. Further, it is *not* the opinion of The Judge Advocate General that AFR 110-3 is invalid, whether for the reasons you suggest or for any other reasons. On the contrary, it is a proper limitation of the activities of Air Force judge advocates. The accused is assuredly entitled to the employment of counsel for any legal procedure which he desires to undertake. There is no obligation upon the United States to supply his counsel except to the extent authorized by law and regulation.

3. With respect to paragraph 4 of your letter, you are advised that, absent special circumstances which would warrant a different determination, this will also apply to your representation of other personnel whom you are

assigned to defend under Article 27 or whom you defend as individual military counsel under Article 38(b).

/s/ Harold R. Vague
HAROLD R. VAGUE
Brigadier General, USAF
The Assistant Judge Advocate General
United States Air Force

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed October 3, 1973]

[Title Omitted in Printing]

PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

Upon the complaint herein, the attached affidavits of Leonard B. Boudin and Captain Byron D. Baur, USAF, and the accompanying memorandum of law, plaintiff moves this court to grant a preliminary injunction:

A. Enjoining the defendants, their agents, servants, employees, attorneys and all persons in active concert and participation with them, pending the final hearing and determination of this action, from requiring the plaintiff to submit to a court-martial which includes charges based upon Article 134 of the Uniform Code of Military Justice, 10 U.S.C. § 934;

B. Enjoining the defendants, their agents, servants, employees, attorneys, and all persons in active concert and participation with them, pending the final hearing and determination of this action, from prosecuting the plaintiff pursuant to any and all charges, unless full and unlimited access to all documents relevant and material to the case, including delivery to civilian defense counsel of a copy of the entire record of the proceedings at plaintiff's first court-martial and the documents upon which the present and past charges are or have been based, is granted immediately to plaintiff, his chosen civilian defense counsel, and such legal associates and assistants as are appropriate to that counsel's adequate preparation for trial.

C. Enjoining the defendants, their agents, servants, employees, attorneys, and all persons in active concert and participation with them, pending the final hearing and determination of this action, from prosecuting the plaintiff pursuant to any and all charges unless a fully

open public trial is immediately guaranteed to the plaintiff.

D. Enjoining the defendants, their agents, servants, employees, attorneys and all persons in active concert and participation with them, from prohibiting the plaintiff's military counsel Captain Byron D. Baur, USAF and Captain Alessandro J. Ranciglio, USAF, from providing legal assistance to or appearing for the plaintiff in connection with collateral matters before the civil courts of the United States arising out of the criminal charges brought against the plaintiff.

E. Granting such other and further relief as this Court may deem appropriate.

Plaintiff requests a hearing on this motion.

/s/ Leonard B. Boudin
LEONARD B. BOUDIN
ERIC M. LIEBERMAN
RABINOWITZ, BOUDIN & STANDARD
30 East 42nd Street
New York, New York 10017

/s/ Joseph Forer
JOSEPH FORER
FORER AND REIN
430 National Press Building
Washington. D. C. 20004

Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed October 3, 1973]

[Title Omitted in Printing]

STATE OF NEW YORK)
: ss.:
COUNTY OF NEW YORK)

LEONARD B. BOUDIN, being duly sworn, deposes and says:

1. I am chief counsel in the criminal proceedings entitled "United States v. Master Sergeant Raymond G. De Champlain," which is the subject of the pending action. I was requested by the accused and by his military defense counsel to represent Mr. De Champlain, because of my experience in similar litigation involving charges of violations of the espionage laws.

2. More specifically, I represented the defendant Coplon in *Coplon* v. *United States*, 185 F. 2d 629, *cert. den.*, 342 U. S. 920 and *Coplon* v. *United States*, 191 F. 2d 749 (D.C. Cir. 1951) *cert. den.*, 342 U. S. 926, as a result of my appointment in the first of those cases by Judge Sylvester J. Ryan of the United States District Court for the Southern District of New York. I represented Dr. Daniel Ellsberg in *United States* v. *Russo and Ellsberg*, No. 9373-WMB-CD, as a result of having been retained for that purpose by Dr. Ellsberg. I was chief counsel for Dr. Ellsberg from the time of his first indictment to the end of the case. The indictment charged violations of 18 U.S.C. 371, 641, 793(c), 793(d) and 793(e). A copy of the indictment is annexed hereto as Exhibit "A."

3. The *Ellsberg* case, as did the *Coplon* case, involved many so-called classified documents, some of which were classified and some of which had never been made public before the trial. In particular, the four so-called negotiation volumes in the *Ellsberg* case had never been published by The New York Times or any other newspaper. They were revealed for the first time when they were introduced by the Government at the trial.

4. In the *Coplon* case, all of the documents involved were made available to her defense counsel without any restrictions upon their right to examine them, to take notes with respect to them, or to use them in consultation with colleagues and associates. In the *Ellsberg* case, Judge Matthew Byrne, Jr., the presiding judge, granted the defense application for an order directing the Government to deliver a copy of the classified documents involved to defense counsel. A copy of the order is annexed hereto as Exhibit "B."

5. Judge Byrne imposed no restrictions upon defense counsel with respect to their making any notes which would facilitate their preparation for the trial. Indeed, he specifically recognized that the classified documents would have to be read and examined not only by the principal defense counsel but by their associates, by stenographers, clerks, typists, and legal consultants. Hence the order provided for the submission *in camera* to the judge of the names of persons to whom such copies were to be made available. This was done in several score of cases; indeed, there may have been a hundred persons who ultimately had access to one or more of the top secret and otherwise classified documents. The court was advised of the names of such persons as a step in securing their agreement not to release the information to persons not authorized by the court. The implementing procedure is reflected in Exhibit "C," from which I have excised the name of the individual consultant. In no case did the court pass upon the selection by defense counsel of persons to whom copies were to be sent. As a result, I and the other defense counsel made copies of the various top secret documents and transmitted by mail and otherwise such copies to associate attorneys, legal workers, expert consultants, and possible witnesses.

6. Many of the consultants used in the *Ellsberg* case were previously experts on the subject of classification procedures, national defense, public domain and the Indo-China war. Many more became expert as a result of their

work upon the case. As a consequence, since many of the problems are similar, I have retained for purposes of this case a number of the consultants used in the *Ellsberg* case; these include Professor Richard Falk of Princeton; William G. Florence, formerly leading security specialist in the Department of Defense; Professor Noam Chomsky of The Massachusetts Institute of Technology; and Professor Howard Zinn, of Boston University, who were both consultants and who testified as defense witnesses in the *Ellsberg* case; and the following scholarly researchers: Adam Bennion, Sam Hurst, presently a teaching assistant to Professor Zinn; and Paul Ryder.

7. It is necessary for defense counsel to obtain possession of such documents and to make them available to the consultants and potential witnesses for the defense if an effective defense is to be presented with respect to the charges against Sergeant De Champlain under 50 U.S.C. 783 (b) and 18 U.S.C. 793. 18 U.S.C. 793 involves such issues as whether the documents relate to the national defense; whether there was reason to believe that their disclosure could injure the United States in its national defense or be of advantage to a foreign nation with respect to the national defense of the United States; and whether the documents are in the public domain. Both 18 U.S.C. 793 and 50 U.S.C. 783 (b) also pose questions as to whether the documents were classified by persons authorized to classify them, whether they were otherwise lawfully classified, and whether they were classifiable, i.e., contained information whose disclosure would be prejudicial to the United States. These are issues well recognized by the judicial decisions and by the commentators. We refer this Court particularly to the most recent learned article on the subject by Harold Edgar and Benno C. Schmidt, Jr., *The Espionage Statutes and Publication of National Defense Information*, 73 Columbia Law Review, 929 (1973). The issues which we have indicated above are specifically those which were referred to by Judge Byrne in his tentative statement to counsel of the issues made in the course of the *Ellsberg* case. A copy is attached as Exhibit "D." As is well known, Judge Byrne did not have

occasion to instruct the jury on these issues by reason of the dismissal of the indictment for governmental disconduct.

8. It is apparent that without the customary access of counsel and the right of counsel to prepare witnesses and to discuss the contents of these documents with defense consultants, it is impossible to raise these and related defenses. The restrictions imposed by the defendants in this case are unworkable. The Government's suggestion in the *Ellsberg* case that Government security procedures might be applicable to defense counsel and their consultants was quickly disposed of by Judge Byrne in his oral rulings which led to the order attached hereto as Exhibit "B."

/s/ Leonard B. Boudin
LEONARD B. BOUDIN

Subscribed and sworn to before me
this second day of October, 1973.

/s/ Herbert Jordan
Notary Public

HERBERT JORDAN

Notary Public, State of New York
No. 31-4506463 Qual. in N. Y. County
Commission Expires March 30, 1975

EXHIBIT B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 9373-WMB-CD

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ANTHONY JOSEPH RUSSO, JR., DANIEL ELLSBERG, DEFENDANTS

[Filed April 27, 1972]

PROTECTIVE ORDER

This matter comes before the Court upon motion of plaintiff, United States of America, for a protective order to prevent the disclosure or dissemination of documents or any portions thereof on the ground that they, or parts thereof, are under a Government security classification pursuant to Executive Order 10501. The documents in question are the following:

(1) Volumes of a Department of Defense study entitled "United States—Vietnam Relations, 1945-1967":

Volume	Title
IV.B.5.	EVOLUTION OF THE WAR, THE OVERTHROW OF NGO DINH DIEM, MAY-NOVEMBER 1963.
IV.C.4.	EVOLUTION OF THE WAR, MARINE UNITS GO TO DA NANG—MARCH 1965.
IV.C.5.	PHASE I IN THE BUILD-UP OF U.S. FORCE — THE DEBATE — MARCH-JULY 1965.
IV.C.9(a).	EVOLUTION OF THE WAR, US/GVN RELATIONS: 1963-1967.

Volume	Title
IV.C.9(b).	EVOLUTION OF THE WAR, US/GVN RELATIONS: 1963-1967.
VI.C.1.	SETTLEMENT OF THE CONFLICT—HISTORY OF CONTACTS NEGOTIATIONS, 1965-1966.
VI.C.2.	VI. SETTLEMENT OF THE CONFLICT C. HISTORIES OF CONTACTS MARIGOLD.
VI.C.3.	VI. SETTLEMENT OF THE CONFLICT C. HISTORIES OF CONTACTS SUNFLOWER.
VI.C.4.	SETTLEMENT OF THE CONFLICT NEGOTIATIONS, 1967-1968—HISTORY OF CONTACTS:

(2) Pages 1, 2, 3, 4, 9, 12, 13 and 14 of a memorandum dated 27 February 1968, entitled "REPORT OF CHAIRMAN, JCS ON SITUATION IN VIETNAM AND MACV FORCE REQUIREMENTS";

(3) Part II of a memorandum entitled "NEGOTIATION AND VIETNAM: A CASE STUDY OF THE 1954 GENEVA CONFERENCE".

The Court having considered the matter, pursuant to Rule 16(e), Federal Rules of Criminal Procedure and the inherent power of the Court;

IT IS HEREBY ORDERED THAT:

(1) Other than as provided in Executive Order 10501 and regulations thereunder, there shall be no disclosure or dissemination of the documents or information contained therein except as provided in this order.

(2) There shall be no public disclosure by either the Government, the defendants, or other individual of any of the above listed documents (hereinafter referred to as "documents") or the information contained therein.

(3) The Government shall furnish to counsel of record for each of the defendants one set of the documents for their use in preparation for and during trial.

(4) Counsel of record for either the Government or the defendants (hereinafter referred to as "counsel")

may permit the documents to be reviewed and inspected by the defendants or any investigators, experts, consultants, or witnesses whom counsel believes are necessary and essential for the preparation and presentation of the case. When counsel desires to permit anyone, other than the defendants, to review or inspect the documents, counsel, prior to said review or inspection, shall provide the Court, in camera, with the names of such persons.

(5) Where counsel believes it is necessary and essential to the preparation and presentation of the case to provide an investigator, consultant, expert, or witness with a copy of the documents or parts thereof, counsel may petition the Court ex parte for permission to make and transmit said copy.

(6) Prior to any person reviewing, inspecting, or receiving the documents or any portions thereof, it shall be the duty of counsel furnishing the documents to serve said person with a copy of this order, and receive from said person a written agreement to comply with the terms of this order. Such written agreements are to be filed in camera with the Court.

(7) No person permitted to inspect or possess a copy of said documents by order of this Court shall copy or reproduce any part of said document or their contents any manner except as provided herein.

(8) When any person receiving documents, or copies of documents or portions thereof, no longer requires that material for the preparation and presentation of the case, those items will be returned to the counsel who furnished the said material. Counsel will hold all such material subject to the provisions of this order until such time as the Court shall otherwise order disposition of such material.

DATED April 25, 1972.

/s/ Wm. Matthew Byrne, Jr.
WM. MATTHEW BYRNE, JR.
United States District Judge

EXHIBIT C

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 9373-WMB-CD

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ANTHONY JOSEPH RUSSO, JR., DANIEL ELLSBERG,
DEFENDANTS

NOTICE OF IN CAMERA FILING

Defendants, by and through their undersigned counsel, hereby give notice of an *in camera* submission of Agreement to Abide by Terms of Protective Order and Acknowledgement of Receipt of Document Covered by Protective Order.

Respectfully submitted,

LEONARD B. BOUDIN
CHARLES R. NESSON
CHARLES E. GOODELL
DOLORES A. DONOVAN

By _____
Attorneys for Defendant
Daniel Ellsberg

LEONARD I. WEINGLASS
H. PETER YOUNG

By _____
Attorneys for Defendant
Anthony Joseph Russo, Jr.

UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

No. 9373-WMB-CD

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ANTHONY JOSEPH RUSSO, JR., DANIEL ELLSBERG,
DEFENDANTS

SUBMISSION OF AGREEMENT TO ABIDE BY PROTECTIVE ORDER AND ACKNOWLEDGEMENT OF RECEIPT OF DOCUMENT COVERED BY PROTECTIVE ORDER

Defendants hereby submit agreement to abide by protective order and acknowledgement of receipt of document covered by protective order for the following person:

Respectfully submitted,

LEONARD B. BOUDIN
CHARLES R. NESSON
CHARLES E. GOODELL
DOLORES A. DONOVAN

By _____
Attorneys for Defendant
Daniel Ellsberg

LEONARD I. WEINGLASS
H. PETER YOUNG

By _____
Attorneys for Defendant
Anthony Joseph Russo, Jr.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 9373-WMB-CD

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ANTHONY JOSEPH RUSSO, JR., DANIEL ELLSBERG,
DEFENDANTS

ACKNOWLEDGEMENT OF RECEIPT OF DOCUMENT COVERED BY PROTECTIVE ORDER

I hereby acknowledge receipt on this date of classified documents specified in the indictment #9373-WMB-CD *U.S.* v. *Anthony Russo & Daniel Ellsberg* as listed below:

Government's Transparency pages relating to intelligence.

Date March 10, 1973

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 9373-WMB-CD

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ANTHONY JOSEPH RUSSO, JR., DANIEL ELLSBERG,
DEFENDANTS

AGREEMENT TO ABIDE BY TERMS OF PROTECTIVE ORDER

I have received this date a copy of the Protective Order issued by Judge William Matthew Byrne, Jr. on April 27, 1972, covering the classified portions of the Pentagon Papers. As a condition to my receiving those papers, or portions thereof, I affirm that I have read and understand the protective order and will abide by its terms.

Date March 10, 1973

EXHIBIT D

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

No. 9373-WMB-CD

UNITED STATES OF AMERICA, PLAINTIFF

vs.

ANTHONY JOSEPH RUSSO, JR., DANIEL ELLSBERG,
DEFENDANTS

TRANSCRIPT OF PROCEEDINGS

THE COURT: Gentlemen, as I have stated to you before, the issues in this case are obviously to be framed by the evidence. And I talked of 793, and during our discussions of 793(d) and (e), which is now for the most part 793(e).

I am going to discuss briefly some of the issues as I see them, in that one section. These are some of the issues that the evidence may well be tested against under 793.

There may well be other issues that come up during the course of the trial by introduction of evidence.

As a matter of fact I assume that there will, and some of those matters that I say are issues now may in fact not become issues because of the evidence as it is introduced.

The statement of issues is not in any way to be intended to be a final determination of the issues raised by the charges in this case. I think I have made that clear to all counsel on several occasions. That obviously is because I haven't heard the evidence in the case.

As I mentioned a few moments ago, the only idea that I have of the evidence in the case is by way of arguments or the very brief statement that the Government made in their trial memorandum.

Therefore, the final determination of the law and the issues under 793 will be made at the time of the jury

instructions, at which time you will have an opportunity to be heard.

I do recognize, however, that in presenting the evidence, both on the Government's side and the defendants' side, it might be of assistance to you if you had my thoughts on what I feel some of the issues are.

So, therefore, I give you some of these tentative thoughts, contingent, of course, on what the evidence ultimately demonstrates that the issues in the case are.

I want to make it clear that this tentative statement of issues is not to be taken as a limitation by the Government or any limitation by the defendants of what you may attempt to prove or disprove at this trial.

You are to proceed with your case, as you feel it should litigated. I will deal, as in the normal case, with the offers of evidence at the time that they are made.

I am not by this statement attempting in any way to limit what you feel the issues in the case are. I don't want anybody later saying, "Well, you told us the issues were this" or "the issues were that, and we didn't put evidence on," or "we relied upon that statement in the presentation of our case."

Is that understood by the Government?

MR. NISSEN: Yes, your Honor.

THE COURT: By the defense?

MR. NESSON: Yes, your Honor.

MR. WEINGLASS: Yes, your Honor.

THE COURT: In stating what I feel the tentative issues are, I have kept in mind what I feel is the congressional purpose behind this statute. And that is to protect information and documents that belong to the Government, which have been kept confidential by the Government, in prevention of injury to the nation.

In 793 I find the following major issues:

1. Was the possessor in unauthorized possession at the time of the offense?

Some subissues to that are:

Were the documents such that authorization was required to possess them?

Another subissue is: Did the defendant have such authorization at the time of the offense?

And another subissue would be: Even if his possession was originally authorized, had it at some point become unauthorized—not unauthorized in use, but unauthorized in possession.

Moving then to the next issue, did the documents relate to the national defense at the time of the offense?

A subissue is: Was the subject matter of the documents within the Gorin definition of "relates to the national defense"?

And I do not, by that, say that I intend to be fully limited to the Gorin definition, because I feel that there are other matters that must be considered in determining whether a document relates to the national defense in this statute, within this section of that statute.

Subissue b: Were the documents owned by the government, and had the government taken measures to keep the information in the documents confidential—that is, not publicly available?

Another subissue would be: Do the documents and the information contained therein relate to the current national defense—that is, the national defense as of the time of the alleged offense, and is there a relation to the current national defense in a way that is direct and reasonable, rather than strained and arbitrary?

Another subissue, which is not in Gorin—however, they are analyzed and discussed by the court in Gorin.

Are the documents the type that require protection in the interest of the national defense, in that their disclosure could adversely affect or injure this nation or be to the advantage of any foreign nation?

That would be as to the nature of the document.

Another subissue would be: Were the documents, in fact, confidential and the type that their disclosure could reveal information that was not at that time publicly available?

Moving then to an issue of: Who was the person not entitled to receive it? This issue, more than any of the others, will depend greatly upon the facts of which I am, as I said before, not aware.

The subissues under this would be: Did the government own these documents, and had the government, as

owner, restricted the transmission of the documents in any way?

If the dissemination of the documents was restricted, how was it done? Was it done by specific instructions or by general rule or regulation?

If the dissemination was restricted by specific instructions, did the person issuing these instructions have the authority to do so? Did the instructions designate the persons entitled to receive the documents? Did it require that anyone receiving the documents obtain permission in advance? Was the recipient entitled to receive the documents under the instructions, or was he precluded from access by the instructions?

If the dissemination of the documents was restricted by rule or regulation, and the determination of a person not entitled to receive is to be made by rule or regulation, the issues involved here would then be—some of them would be as follows:

If the rule or regulation is the classification system, were the documents lawfully classified under Executive Order 10501? Were they classified by someone with authority to classify? Were the documents, in fact, classifiable—that is, at a minimum, did they contain information or material, the unauthorized disclosure of which could be prejudicial to the defense interests of the United States?

The question, then, as to the classifying of the documents, would be—one issue would be as to whether the person who classified them had authority to classify them, and, secondly, whether the documents were, in fact, classifiable, in order to bring them within the Executive Order 10501?

Continuing on, if the nonentitlement is to be shown by way of a rule or regulation, it would have to also be shown—the issue would have to be: Was the recipient among those who was excluded from the possession by the Executive Order and the rules and regulations of government agencies promulgated under the Executive Order?

Did the recipient have official duties which required such documents in the interest of promoting the national defense?

Had the recipient been determined to be trustworthy to receive such documents by an official of the Executive Branch with authority to make those determinations?

Turning to the issue—there also obviously, as I say, depending on the facts—there is just a general broad issue in the "not entitlement" in Coplon, and all the other cases, where the judge just told the jury that obviously they are not entitled to it, and I don't think that applies as I know the facts here, but:

Were there any facts such that it would be obvious that the recipient should not receive such documents?

Turning to the question of the willful transmission of the documents to a person not entitled to receive them. This statute requires more than a knowing transmission of the documents; it requires knowledge, and, in effect, scienter.

MR. BOUDIN: Could I just interrupt your Honor? Will your Honor oblige us by moving a little more slowly? We are going to get the minutes, and I can follow your Honor, but a little slower, if you will. I am not asking your Honor to go back.

THE COURT: Yes. As to the question of willfulness, there are three major subissues:

Did the defendant at the time of the transmission, delivery or communication, know that the recipient was not entitled to receive the documents?

The issue will be: Did the defendant make a knowing transmittal of the documents to a person not entitled to receive them?

In other words, the issue would be: Did the defendant know for any reason that the recipient should not receive the documents or that someone's permission was required before the recipient could have access to the documents?

At the same time, the transmitter, at the time of the offense—the issue will be: Did he know or have reason to believe that the documents related to the national de-

fense, as I described them above? And that would include the elements of Gorin and all of the other elements that I stated above, including the adverse effect on this nation, and to the advantage of a foreign nation.

Did he know or have reason to believe that the documents related to the national defense, or that in the interests of the national defense they were to be kept confidential?

That would be a willful, knowing communication of a document, knowing or having reason to believe that it relates to the national defense, knowingly communicated or transmitting it to a person the transmitter knows is not entitled to receive it.

Those are the general issues, as I see them, in 793.

In 793(c), I am not going to go through them by issue.

There was one matter that was left, and that was whether—I don't have the section. I guess it was for purpose aforesaid, whether that includes "and with like intent." I am of the opinion that it does not include "with like intent." The intent required for (c) is picked up through (d) and (e).

I hope that it is not necessary to again state that I am giving you these issues, to both sides, to generally consider in the introduction of your evidence, and I do not intend to give much credence to someone who raises the fact that I raised these issues before trial.

I am doing it in a manner just so you may have those thoughts before you in consideration of the presentation of your evidence.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed October 3, 1973]

[Title Omitted in Printing]

AFFIDAVIT

Now comes Byron D. Baur, being first duly sworn, deposes and says:

I am a duly licensed attorney and counselor at law, and I am a member of the Bars of the Supreme Court of the Commonwealth of Pennsylvania and of the United States Federal District Court for the Western District of Pennsylvania. I am also a duly certified judge advocate in the United States Air Force, and I am the chief military defense counsel designated by the Air Force to represent Master Sergeant Raymond G. DeChamplain in his rehearing by General Court-Martial. I have been engaged in representation of Master Sergeant DeChamplain since sometime in April 1973, and since that time have been in charge of all other military defense counsel working on the DeChamplain case. I have been his chief military spokesman at both pretrial sessions held thus far in the case under Article 39(a), Uniform Code of Military Justice, 10 U.S.C. Sec. 839(a).

In anticipation of the apparent necessity for Master Sergeant DeChamplain to seek relief from appropriate federal courts as to certain aspects of the Air Force's handling of his case, I have endeavored on two occasions to receive official permission to represent Master Sergeant DeChamplain, or to have another judge advocate defense counsel represent Master Sergeant DeChamplain, in whatever federal court action might become necessary. On 7 May 1973, I joined as co-signer with Captain James R. Crassweller, another judge advocate defense counsel, in writing to our military superior in the Office of The Judge Advocate General, United States Air Force, requesting such permission. That letter was

couched in terms of requesting such permission to represent all of our clients in such non-court-martial judicial proceedings, where the proceedings would directly relate to military charges pending against our clients or other government actions affecting our clients' rights, such as the imposition of pretrial confinement without legal justification. I never received a reply to that request, but Captain Crassweller did receive a reply, dated 21 May 1973, denying him such right to go into federal civil court. The letter stated generally that "judge advocates may not participate in proceedings in civil courts, even where the proceedings are collateral to a court-martial in which the judge advocate is a defense counsel for an accused who is a party to the civil action."

Subsequently on 23 July 1973, I wrote directly to The Judge Advocate General, United States Air Force, requesting specific permission to represent Master Sergeant DeChamplain in civilian court actions related to defending the pending court-martial charges against him. My request was made for myself and for Captain Alessandro J. Ranciglio, the assistant military defense counsel, who was and is, incidentally, admitted to practice before the Federal District Court for the Western District of Missouri, which is the very court in which a federal court action in behalf of Master Sergeant DeChamplain, contesting the legality of his pretrial confinement, would normally be brought. By letter dated 31 July 1973, Brigidier General Harold R. Vague, The Assistant Judge Advocate General, United States Air Force, denied Captain Ranciglio and me the right to represent plaintiff in federal civil court. The position of The Judge Advocate General's office, as derived from their letters of 21 May 1973 and 31 July 1973, is that 50 U.S.C. Sec. 205 forbids an officer or employee of the federal government from representing parties in actions in which the United States is a party, except where required in the discharge of his official duties; that the discharge of a judge advocate's official duties (for some reason) does not encompass representing his client in any proceedings other than a court-martial; that Air Force Regulation 110-3, paragraph 2, as interpreted by their office, implements 50 U.S.C. Sec. 205 in such a way as to positively forbid a judge advocate from representing his military accused/client in civilian courts. The Office of The Judge Advocate General, United States Air Force, constitutes my military superior in carrying out all of my military duties. At present I would possibly be in violation of Article 92, Uniform Code of Military Justice, 10 U.S.C. Sec. 892, as well as risking the disapprobation of my superiors, if I were to violate these restrictions which they have placed on me. Within the United States Air Force, the Office of The Judge Advocate General is the "office of primary responsibility" for the promulgation and interpretation of Air Force Regulation 110-3. Therefore, having asked that office's opinion and having received it on two occasions, I have exhausted the appropriate channels in seeking to aid my client by representing him in federal court.

The United States Court of Military Appeals has indicated that it lacks jurisdiction to determine the propriety of such regulatory restrictions placed on the practice of a judge advocate defense counsel in civilian courts. *Johnson* v. *The Judge Advocate General of the United States Army*, 45 CMR 294 (1972).

It is my professional opinion that at this stage in the court-martial proceedings, federal court proceedings by way of habeus corpus or other petition for extraordinary relief are appropriate and necessary to protect my client's constitutional rights. Military authorities and the military court have provided no relief from the denial of substantial constitutional rights which I believe are due my client, involving such issues as the unconstitutionality of Article 134, Uniform Code of Military Justice, 10 U.S.C. Sec. 934; my client's right to a public trial which they intend to deny him; the legality of his pretrial confinement, for which there has not been any judicial review obtainable within military judicial channels; and my client's right to the effective assistance of a civilian counsel of his choice, who is being severely hampered by military restrictions on access to relevant "classified" information.

Concerning the causes of action stated in plaintiff's Complaint for Declaratory Judgment and Injunctive Relief, the matters raised in the first three causes of action have all been raised before the military judge of the General Court-Martial hearing Master Sergeant DeChamplain's case, who is Colonel Russell A. Stanley. All of these matters have been decided adversely to the plaintiff. Specifically, the unconstitutionality of Article 134, Uniform Code of Military Justice, 10 U.S.C. Sec. 934, was made the subject of a motion to dismiss and was extensively briefed and argued to the military judge in a hearing held from 4 to 8 September 1973, and that motion was denied by the military judge. Likewise, several motions requesting access to all relevant information in the case for individual civilian defense counsel Mr. Leonard B. Boudin, and his associates, including technical consultants and experts, have been made in hearings held 16-20 July 1973 and 4-8 September 1973. Likewise, numerous requests, by letter and verbally, have been made to Air Force officials responsible for prosecuting and processing the DeChamplain case. All such efforts have been unsuccessful, except to the extent indicated in the instant Complaint. A motion for a "public trial" of all charges against the plaintiff was made by me and supported by extensive argument and citation of legal authorities during the hearing 16-20 July 1973. This motion likewise was denied by the military judge, who indicated that the court would be closed to all persons not possessing the appropriate security clearances or "need to know," whenever classified documents or information were being introduced or discussed.

Concerning the second cause of action, the denial of access to the entire record of the prior court-martial trial and the "classified" documents upon which the current charges on rehearing are based, it is my opinion, after having personally reviewed all of these documents, that a full and adequate understanding of the case and the possible theories of defense will not be available to civilian counsel, Mr. Leonard B. Boudin, and his associates, technical consultants, expert witnesses, etc., until they have had full and adequate opportunity to review,

discuss, and analyze all of these various documents and their implications to the case. Although Captain Ranciglio and I have had limited access to these documents and are knowledgeable of their contents, we have been forbidden by law and regulation to disclose their contents to Mr. Boudin or his referenced associates, and we have not done so and will not do so without official approval. However, after having discussed the defense of this case with Mr. Boudin and certain of his associates in general terms and without specific reference to those documents, it is my professional opinion that several potentially fruitful opportunities for presenting a vigorous defense exist, which can never be adequately understood or developed by civilian counsel unless and until he and his associates have extensive access to the documents involved. It is further my specific opinion that the technical consultants/experts listed thus far by the defense, and perhaps others, as necessary, will need to see and work extensively with the documents in question in order to adequately develop several potentially valid defenses, such as the legality of the classification process involved, the propriety of classification of certain of these documents, "public domain" of certain of the matters contained in the documents, etc. If I were the only defense counsel in this case, I would still desire to utilize these experts, or others with similar knowledge and training, in the defense of this case. These averments of mine go equally to the approximately fifteen documents which are being "withdrawn" by the government as they do to the approximately nine documents which the government has indicated it will provide Mr. Boudin limited access to.

With regard to the denial of access to Mr. Boudin, his associates and consultants, the military judge's rulings thus far have consistently upheld the prosecution's position that access will only be granted to the limited number of the "classified" documents which the prosecution concedes are relevant and which will be offered in evidence by the prosecution. The military judge's rulings have also been to the effect that only Mr. Boudin, one of his law partners, and one of his clerk/typists can

have such access, and only at the times and places and under the several restrictions specified by the government, as stated in the Complaint. As of the date of this Affidavit, additional defense and prosecution motions on certain "access" questions were still pending before the military judge, his rulings on which could somewhat modify the extent of Mr. Boudin's access. However, in view of the military judge's rulings thus far, I am not of the opinion that the full and unrestricted access demanded in the Complaint will be granted on the basis of these or any further motions.

With regard to plaintiff's probable confinement status in the event that he is convicted by the court-martial and sentenced, inter alia, to some period of confinement at hard labor, I am of the opinion that he will be held in confinement for the many months, or even years, before the military appellate courts have completed their review of the case. Although deferment of service of sentences to confinement are permitted under paragraph 88f, Manual for Courts-Martial, 1969 (Rev.), the decision to defer such confinement is entirely discretionary with the Convening Authority, and that official has consistently exercised his very similar discretion in favor of keeping the plaintiff in pretrial confinement.

/s/ Byron D. Baur
BYRON D. BAUR,
Captain, USAF
Defense Counsel

SUBSCRIBED AND SWORN TO BEFORE ME, this 28 day of September, 1973.

/s/ James R. Crassweller
JAMES R. CRASSWELLER,
Captain, USAF
Judge Advocate

Notarial Authority: 10 U.S.C. Sec. 936.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed October 25, 1973]

[Title Omitted in Printing]

MOTION TO DISMISS

Defendants, by their attorney, the United States Attorney for the District of Columbia, respectfully move the Court to dismiss this action for failure of the complaint to state a claim upon which relief can be granted or over which this Court has subject-matter jurisdiction. Rule 12(b) (1, 6), F.R.Civ.P.

Attached hereto are a memorandum of points and authorities and a proposed Order.

/s/ Harold H. Titus, Jr.
HAROLD H. TITUS, JR.
United States Attorney

/s/ Arnold T. Aikens
ARNOLD T. AIKENS
Assistant United States Attorney

/s/ Michael A. Katz
MICHAEL A. KATZ
Assistant United States Attorney

EXHIBIT C

DEPARTMENT OF THE AIR FORCE

HEADQUARTERS UNITED STATES AIR FORCE
USAF Trial Judiciary, Fourth Circuit
Lowry Air Force Base, Colorado
80230

UNITED STATES

v.

MASTER SERGEANT RAYMOND G. DECHAMPLAIN
FR 043-24-7022, 1840th Air Base Wing
Richards-Gebaur Air Force Base, Missouri

COURT ORDER NUMBER 1

This order pertains to Government Motion for Restricting Issues (Appellant Exhibit CXXVII).

It is hereby ordered and held as follows:

a. That in order to prove the element under Section 783(b) of Title 50 that a document is classified as affecting the Security of the United States, it is necessary only to prove that a document or the information of the document was classified and that a person with authority to classify had designated the classification.

b. That any evidence concerning the security classification system is to be limited to whether an individual who designated a classification had classification power. It would not be proper for either the Government or the Defense to call expert witnesses in the security classification area on the issue of whether a particular document should have received the security classification stamped on it.

c. That it is not necessary under the 18 USC 793 violations for the prosecution to prove that a particular document and/or information contained therein in fact, adversely affect or injure this nation or be of advantage

to a foreign nation. Further, in view of this holding, this Court will not allow expert witnesses for either the Government or the Defense to testify whether documents and/or information could, in fact, adversely affect or injure this nation or be of advantage to a foreign nation.

d. In proving the propriety of any security classification, the prosecution may rely on the presumption that a document with a security classification stamp on it, which has been treated as a classified document in official channels, is presumed to have been classified by an official with the appropriate authority.

This 13th day of October 1973.

/s/ Russell A. Stanley
RUSSELL A. STANLEY,
Colonel, USAF
Military Judge

EXHIBIT D

DEPARTMENT OF THE AIR FORCE

HEADQUARTERS UNITED STATES AIR FORCE
USAF Trial Judiciary, Fourth Circuit
Lowry Air Force Base, Colorado

UNITED STATES

v.

MASTER SERGEANT RAYMOND G. DECHAMPLAIN
FR 043-24-7022, 1840th Air Base Wing
Richards-Gebaur Air Force Base, Missouri

COURT ORDER NUMBER 5

This order pertains to those pending matters to be decided concerning Defense Motion for Appropriate Relief (Disclosure of Entire Record of Former Trial and Other Matters Material to Case) (Appellate Exhibit XCIV), and Government Motion to Restrict Access to Civilian Defense Counsel Team to Classified Material.

The Government motion to restrict access of civilian defense counsel team to classified material is granted in its entirety. The civilian defense counsel team consisting of Mr. Boudin, Mr. Krinski, and Mr. Charles will be granted access to the classified materials listed in Attachment 1 (Appellate Exhibit CXXXVIII) to said Government motion, as well as Article 32 testimony and former trial testimony relating thereto, subject to the conditions listed therein as well as those conditions set forth in Memorandum of Understanding (Attachment 2) to said Government motion.

The relief sought in paragraphs a, b, and c of Defense Motion for Appropriate Relief (Disclosure of Entire Record of Former Trial and Other Matters Material to Case) (Appellate Exhibit XCIV) which asks for documents or testimony beyond the scope of such restricted access is denied.

The relief sought by defense in their Motion for Appropriate Relief (Disclosure to Entire Record of Former Trial and Other Matters Material to Case) (Appellate Exhibit XCIV) in paragraphs g, h, i, j, k, and the last two paragraphs of said motion is denied.

This 13 day of October 1973.

/s/ Russell A. Stanley
RUSSELL A. STANLEY,
Colonel, USAF
Military Judge

EXHIBIT E

DEPARTMENT OF THE AIR FORCE

HEADQUARTERS UNITED STATES AIR FORCE
USAF Trial Judiciary, Fourth Circuit
Lowry Air Force Base, Colorado

UNITED STATES

v.

Master Sergeant
RAYMOND G. DECHAMPLAIN
FR 043-24-7022
1840th Air Base Wing
Richards-Gebaur Air Force Base, Missouri

TRANSCRIPT OF PROCEEDINGS

Abbreviations

TC—Trial counsel (prosecutor)
DC—Defense counsel
ADC—Assistant defense counsel
MJ—Military Judge

TC: The government's position, Your Honor, is that, first of all, the classification and the classified documents is not essential to the guilt or innocence of the accused. In other words, the classified information that we are concerned with here does not go to whether or not the accused is guilty. All that is necessary is that we show that the documents are classified and, of course,

classified means relating to the national security—national defense—and that it was classified purposely and properly. The actual content of those messages does not go to the guilt or innocence of the accused. Under Title 18, of course, if a document was classified or had a classification on it—confidential, secret, top secret—then the accused would be presumed to know that could be used to the injury of the United States; and under Title 50 again the classification itself serves to show that it relates to the national defense because that, of course, is what the classification means.

The defense hasn't cited any cases directly in point; and this has to be a balancing, of course, between the accused's right to a public trial and the right of the United States to protect its secret documents from the eyes of the public and from the eyes of anyone who might use those documents to the detriment of the United States. So cases that involve mere confidential materials aren't really what we are talking about; we're talking about documents that are marked "top secret", documents that are marked with classification that mean that they relate to the national defense.

So to sum it up, the defense counsel does not cite cases directly in point concerning what we are doing here. Of course, as far as precedent goes there have been many, many cases that have had closed proceedings concerning a classified portion of the case; and, of course, the trial will be public as concerns those matters that are not classified and that will be the major portion of the trial. There will only be small portions of the trial that will be classified and will not be open to the general public. Of course, the defense makes a good point that a trial should be public and should be open, but this necessity has to be weighed against the interests of national defense that I mentioned. Thank you.

ADC: Rebuttal, Your Honor.

MJ: Yes.

ADC: First of all, Your Honor, I would hasten to disagree with one comment of trial counsel. I don't believe the government has the right to assume any ele-

ment of any offense against the accused; and since the accused stands charged with unlawful possession of classified documents, evidence we anticipate the government will attempt to produce will be to show that the documents possessed had bearing on the national interest. I fail to see where just the word "confidential", "secret" or "top secret" in and of itself would satisfy that requirement—that element of the offenses charged. You have to get into the nature or the contents of these documents. I will readily agree with trial counsel that history is full of cases of closed hearing. I would say principal among these is Spanish Inquisition and the English Star Chamber. That does not mean that these closed proceedings are proper. We reiterate that the contents of the documents included in the charges which stand against our client are part and parcel of the nature of the offense charged.

MJ: The Manual for Courts-Martial gives the military judge discretion to determine if the trial should be closed, and specifically lists as one of the reasons he can close it the hearing of classified information, and I'll make that determination when the time comes. But in answer to your question though so you can anticipate, if I do determine it is classified information, then I will close the court to the public. So in that sense your motion is denied.

DC: Is that for all levels of classification, sir?

MJ: Well, if it arises it will be closed to any persons not authorized access to those particular documents and/or testimony no matter what the classification.

DC: But you're saying that as long as some agent of the government has decided to label a particular document "Classified", you are going to accept that and close trial?

MJ: I didn't say that. I'll make a judgment when it comes up.

DC: I see. All right.

MJ: I didn't say just because he labeled it such I would close it. I said I will do what the Manual says I have the power to do. After considering all the facts, anticipated testimony and documents—after examining

the documents and the type of testimony that will come before me—I will make that decision at that time. But I don't mean to play games with you—in the sense that you are asking for a complete and open public trial as set forth in this Appellate Exhibit XIII, your motion is denied.

DC: In that regard, sir, I'll renew my motion with regard to allowing us full use of the Charge Sheets—that one item. You said you would review documents item for item. We specifically address your attention to the Charge Sheet which has been classified Confidential and which the government by its own admission believes contains only one general topic that might justify any such classification, and that is the hiding of the names of several Thai witnesses. Now, I suggest to you, sir, that while often the government chooses to hide the names of confidential informants in cases, it does not have the power to classify such a matter as confidential, secret, or top secret in the defense of the United States national defense simply to keep such Thai agents, who happen to be employed two years ago in this kind of work, confidential.

EXHIBIT F

DEPARTMENT OF THE AIR FORCE
Headquarters US Air Force
Washington DC 20330

AF REGULATION 110-24
29 June 1973

Judge Advocate General Activities

LITIGATION, TAX DISPUTES, ADMINISTRATIVE PROCEEDINGS, AND LEGAL PROCESS

This regulation directs what action Air Force personnel take in connection with litigation, tax disputes, commencement of legal or administrative proceedings, and service of legal process involving the Air Force, Air Force personnel in the performance of official duty, or Air Force instrumentalities (including nonappropriated fund activities) in the United States and foreign countries. It applies to all USAF activities, including the Air Reserve Forces and the Air National Guard.

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Supercedes AFR 110-3.5 October 1967. (For summary of revised, deleted, or added material, see signature page.)

OPR: JACL

DISTRIBUTION: S

SECTION A—GENERAL PROVISIONS

1. Functions of The Judge Advocate General. The Judge Advocate General of the Air Force initiates, supervises, and coordinates all actions necessary to protect the interests of the United States in all legal and administrative proceedings, tax disputes, and legal matters which arise out of or otherwise affect Air Force activities in the United States and in foreign countries. The Judge Advocate General of the Air Force:

a. Maintains close liaison with the Department of Justice and assists in procuring evidence supporting the position of the Government, in preparing pleadings and briefs, in compiling the evidence and evaluating it, and in preparing trial and appellate presentations.

b. Makes Air Force recommendations on the initiation of legal actions and appeals and on the acceptability of proposed compromises or settlements of pending litigation or controversies.

c. Maintains close liaison with other Department of Defense agencies and the General Accounting Office and cooperates in procuring evidence supporting the position of the Government.

d. Negotiates and corresponds with and presents evidence, pleadings, and briefs to Federal, State, and municipal regulatory bodies in administrative and quasi-judicial proceedings.

Except as otherwise provided by this regulation, all actions pertaining to the aforementioned responsibilities are taken only by The Judge Advocate General of the Air Force and those specifically authorized by him to act on his behalf, and commands subordinate to HQ USAF will not initiate or otherwise take any action pertaining to these responsibilities unless specifically authorized by The Judge Advocate General of the Air Force.

2. Air Force Personnel and Employees as Counsel. No person on active duty with the Air Force or employed by the Air Force will appear as attorney or counsel for the Air Force before any civil court, tribunal, administrative body, or Government agency in the United States or in a foreign country unless specifically authorized by The Judge Advocate General of the Air Force. Under no circumstances will any person on active duty or employed by the Air Force appear as attorney or counsel for the Air Force before any civil court, tribunal, administrative body, or Government agency in the United States or in a foreign country in behalf of individuals in matters not connected with the performance of official Air Force duties.

3. Report of Legal Activities, RCS: HAF-JAC (AR) 7301. Reports will be prepared and submitted in accordance with the instructions contained in sections B and C of this regulation.

4. Persons Responsible for Reporting. In all cases, the staff judge advocate of the installation or unit concerned is responsible for complying with the reporting requirements specified in sections B and C of this regulation. If there is no staff judge advocate assigned to the installation or unit, then:

a. On all matters except those pertaining to contracts, subcontracts, and purchase orders, the commander of the installation or unit concerned will be responsible for complying with the reporting requirements.

b. On all matters pertaining to contracts, subcontracts, and purchase orders, the appropriate plant representative or contracting officer is responsible for complying with the reporting requirements.

5. Documentation. Disposition of documentation prescribed by this regulation will be according to AFM 12-50.

SECTION B—LEGAL AND ADMINISTRATIVE PROCEEDINGS, TAX DISPUTES, AND LEGAL MATTERS ARISING WITHIN THE UNITED STATES, ITS TERRITORIES, OR ITS POSSESSIONS

6. Lawsuits Filed Against the United States in Federal Courts. By statute, service of summons and complaints

in lawsuits filed in US Federal courts against the United States, including suits under the Federal Tort Claims Act, is made on the United States Attorney and/or the Attorney General. He then requests an investigative report from HQ USAF. HQ USAF, in turn, makes a direct request on subordinate commands for reports and issues instructions as to their distribution.

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed November 8, 1973]

[Title Omitted in Printing]

PLAINTIFF'S NOTICE OF AMENDMENT TO MOTION FOR PRELIMINARY INJUNCTION

PLEASE TAKE NOTICE that upon the papers previously filed in support of plaintiff's motion for preliminary injunction, and upon the affidavits of Captain Byron D. Baur and Leonard B. Boudin, Esq., attached hereto, the plaintiff, upon the hearing for the motion for preliminary injunction, will seek a preliminary injunction granting the following additional relief:

1. Enjoining the defendants, their agents, servants, employees, attorneys, and all persons in active concert and participation with them, pending the final hearing and determination of this action, from intercepting, divulging, recording or using the telephonic, postal and other communications (written and oral) of the plaintiff herein, and of his attorneys and their associates and consultants, in the pending court-martial proceedings against the plaintiff herein, except as expressly authorized by order of a court of the United States pursuant to statute.

2. Directing the defendants to disclose to this Court all logs, recording, memoranda, applications for judicial orders and judicial orders, authorizing any government agency's or agent's interception, recording, examination or divulging of such telephonic, postal or other communications, oral or in writing, of the plaintiff's counsel and their associates and consultants and of the plaintiff himself.

3. Directing the defendants herein to disclose to the Court and ultimately, subject to the approval of the Court, to the plaintiff's counsel herein, the existence, past or present, of such interceptions, recordings, memoranda,

examinations and divulging of telephonic, oral and written communications on the part of the plaintiff at any time in the past, and of any of his counsel from the first dates of their representation of the said plaintiff.

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Attorneys for Plaintiff

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

[Filed November 15, 1973]

[Title Omitted in Printing]

NOTICE OF APPEAL

Notice is hereby given this 15th day of November, 1973, that defendants hereby appeal to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 13th day of November, 1973 in favor of plaintiff against said defendants, granting plaintiff's motion for preliminary injunction.

/s/ Michael A. Katz
MICHAEL A. KATZ
Asst. U.S. Atty.
Attorney for defendants

Room 3433, U.S. Courthouse
Washington, D.C. 20001
426-7381

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

SEPTEMBER TERM, 1973

Civil Action 1863-73

[Filed Apr. 5, 1974, United States Court of Appeals for the District of Columbia Circuit, Hugh E. Kline, Clerk]

No. 74-1363

RAYMOND G. DECHAMPLAIN, United States Air Force

v.

JOHN L. MCLUCAS, Secretary of the Air Force, ET AL., APPELLANT

Before: Wright and MacKinnon, Circuit Judges

ORDER

[Filed April 5, 1974, as amended May 17, 1974]

On consideration of appellants' motion to extend time to docket appeal, of the opposition thereto, of appellants' reply and of appellee's motion for leave to file supplemental reply memorandum, of the response thereto and of appellee's motions to dismiss and for release pending appeal, included in appellee's opposition, it is

ORDERED by the Court that the Clerk is directed to file appellee's aforesaid supplemental reply memorandum and on consideration of all of the foregoing, it is

FURTHER ORDERED by the Court that appellants' aforesaid motion is granted and the time for docketing the record in this appeal is extended for a period of 15 days from the date of the final decision of the Supreme Court in the matter of *McLucas, et al.* v. *DeChamplain*, No. 73-1346, and, it is

FURTHER ORDERED by the Court that the aforesaid motion to dismiss is denied, and, it is

FURTHER ORDERED by the Court that appellee's motion for release pending appeal is denied without prejudice to its being submitted to the District Court.

PER CURIAM

SUPREME COURT OF THE UNITED STATES

No. 73-1346

JOHN L. MCLUCAS, Secretary of the Air Force, ET AL.,
APPELLANTS

v.

RAYMOND G. DECHAMPLAIN

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

The statement of jurisdiction having been submitted in this case and considered by the Court, further consideration of the question of jurisdiction is postponed to the hearing of the case on the merits.

June 24, 1974

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